

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Criminal Misc. Application No.S-785 of 2023
(*Zahidullah v. Ld. Civil Judge & J.M, Nara & others*)

Mr. Mehmood Alam Abbasi, Advocate for applicant/complainant.
Mr.Abdul Salam Shaikh, Advocate files power on behalf of
respondents No.3&4.
Mr. Aftab Ahmed Shar, Additional P.G for the State.

Date of hearing: **22-04-2024**
Date of decision: **22-04-2024**

ORDER

MUHAMMAD IQBAL KALHORO, J.- By consent, application (MA-1235 of 2024) for restoration of this CrI. Misc. Application, dismissed in non-prosecution vide order dated 04.12.2023, is restored to its original position.

2. Learned counsel for applicant argues that after due investigation, the charge-sheet in terms of section 173 CrPC was submitted with recommendation to the Court to take cognizance of the offences. But the learned Magistrate passed the impugned order disagreeing with the conclusion of I.O and in consequence of which disposing of the case under C-class. He further submits that the Magistrate has jurisdiction to disagree with the conclusion of I.O only in the cases where negative reports disposing of the case have been filed before him and not in the cases where positive report holding that *prima facie* the case has been made out.

3. Learned counsel appearing on behalf of respondents No.3&4 as well as learned Additional P.G have not disputed above legal position and have proposed that the Magistrate has *prima facie* erred in law. Therefore, the case may be remanded back by setting aside the order with directions to the Magistrate to pass a fresh order.

4. It is settled, as per scheme of law, that in a positive report of I.O in investigation referring the accused to a trial, the Magistrate has no jurisdiction to disagree with him by disposing of the case under C-class. The conclusion drawn by the I.O that there is

sufficient material to show that the case as reported has been made out for the Court to hold a trial thereon is always based on some material collected by him during investigation. The evidentiary value of which the Magistrate is not competent to discard on taking a summary tour of material before him. It requires examination of witnesses. Therefore, it would be for the Court, be it Magistrate's trial or the Sessions' trial, to apply its mind, in the trial, and decide whether the case is made out or not and then follow the procedure accordingly.

5. The Magistrate's power to disagree with the opinion of I.O is limited to only reports disposing of the case or deleting a particular section. In such cases, the Magistrate by going through the material can form his own opinion disagreeing with the opinion of I.O and take cognizance of offence against the accused by accepting the Challan or restoring the deleted provision. The ratio laid down in **1972 SCMR 516**, **1983 SCMR 370** (para-8), **SBLR 2010 Sindh 306** and **2015 YLR 2312** postulates that the Magistrate has no power to dispose of the case recommended for trial by the I.O on the basis of investigation.

6. The concerned Magistrate without applying his mind and going through the case law as above on the point has passed the order. Therefore, with consent, the order dated 06.09.2023 is set aside and the case is remanded back to him for passing a fresh order keeping in view the ratio laid down by this Court as well as by Supreme Court in the above cases, within 15 days.

7. Accordingly, this Crl. Misc. Application along with pending application is **disposed of** in the above terms.

JUDGE